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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Public Forum on Submarine	)	DA 99-2148
Cable Landing Licenses	)	

COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

Patricia Paoletta
William P. Hunt, III
Level 3 Communications, Inc.
1025 Eldorado Blvd.
Broomfield, CO 80021

Andrew D. Lipman
Troy F. Tanner
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

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TABLE OF CONTENTS

Executive Summary iii

I. Introduction 1

II. Submarine Cable Licensing Rules Should Apply the WTO Agreement's Principles 2

III. Level 3's Guideline Principles 4

IV. Expediting the U.S. Licensing Process 4
- A. Submarine Cable Licensing Should Be Streamlined 7
- B. Redundant Federal Review Should Be Eliminated 9
- C. Only Landing Parties Should Be Required to Obtain a License 11
- D. Standard Conditions Should Be Publicly Available 12

V. Encouraging Diversity of Submarine Cable Builders, Owners, and Backhaul Providers 13
- A. Fees Should Be Non-Recurring, Reasonable and Related to Administrative Costs 14
- B. Carriers Should Be Permitted to Convert to End-to-End Ownership When Destination Markets Become Competitive 16
- C. Companies Should Be Allowed to Build Private Cable Systems Without Common Carrier Obligations 17

VI. The Commission Should Continue Preventing Carriers from Acting Anticompetitively in the Submarine Cable Market 19
- A. Cable Station Access 20
- B. Backhaul 21
- C. Additional Procedural Requirements 21

VII. Other Issues 22

VIII. Conclusion 25

Executive Summary

Level 3 Communications, Inc. ("Level 3") welcomes the opportunity to identify ways the Federal Communications Commission ("Commission") can improve the submarine cable licensing process. Level 3 believes the biennial review on submarine cable licensing rules is an excellent opportunity for the Commission to become a global leader in developing rules that will set the standard for other regulators to follow. With the goal of promoting a more competitive market for next generation networks, Level 3 submits the following guideline principles to applying the internationally accepted principles found in the WTO General Agreement on Trade in Services ("GATS"). These are based on both the GATS Telecommunications Annex and the Reference Paper to the Fourth Protocol. The Annex guarantees service providers in liberalized sectors non-discriminatory access to and use of the public telecommunications network, which includes, in most telecom markets, backhaul facilities. The Reference Paper calls for interconnection on an unbundled, non-discriminatory, cost-oriented and transparent basis, at any technically feasible point in the network. The Reference Paper also calls for public availability of licensing criteria and application of competitive safeguards when necessary to prevent anticompetitive conduct of major suppliers. These principles are as important in the submarine cable context as in any other subset of the telecommunications market. They are critical if regulators wish to encourage next generation submarine systems.

Level 3 urges regulators around the world to view the guideline principles below as an application of agreed upon WTO principles, for their use in developing streamlined competition policies that promote open submarine cable markets, thereby benefiting their countries' consumers and businesses with competitively priced, innovative telecommunications services. The role of the

government should be to facilitate operators' provision of submarine cable capacity on expeditious and reasonable terms and conditions. To accomplish this goal, governments should eliminate all unnecessary licensing requirements. Where licensing is required, governments should: 1) expedite the market-entry licensing and environmental review process, including review by local authorities; 2) encourage a diversity of submarine cable builders, owners, and cable landing station backhaul providers; 3) limit application processing and rights-of-way fees by federal and local authorities to those that are cost-based; 4) deny governmental preferences to existing providers of submarine cable services; and 5) prevent existing carriers from acting anticompetitively in the submarine cable market.

To expedite the licensing process in the United States, the Commission should streamline cable landing licensing by adopting procedures similar to its Section 214 applications. To accomplish this, the Commission should work closely with Executive Branch agencies to identify ways to limit or even eliminate their involvement in the review process. Second, the Commission should require only landing parties to obtain a license. Third, the Commission should develop publicly available conditions to be placed on licenses before they are processed. And, fourth, the Commission should identify areas of redundant state and federal review, and preempt state review in all areas where possible.

In order to encourage diversity of submarine cable builders, owners and backhaul providers, the Commission should ensure that state and federal licensing and permit fees are non-recurring, reasonable and related to administrative costs. Also, the Commission should eliminate the common carrier and non-common carrier distinction and create meaningful categories of licensing conditions

that can be applied based on market conditions in the United States and at the foreign end of the cable, and on the ownership structure of the cable.

Finally, the Commission should continue placing conditions in the licenses of submarine cable systems that have ownership by major suppliers.[1] Major suppliers should be required to implement certain policies and procedures that will ensure carriers have fair and nondiscriminatory access to submarine cable facilities. For example, competing carriers should have access to cable stations and backhaul controlled by major suppliers. They should be able to build or access competitive backhaul services from these cable stations. Competing carriers should also be able to cross-connect to other cable systems.

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[1] A "major supplier," as used in Level 3's comments, is a major supplier of telecommunications services as defined in the WTO Reference Paper, *i.e.*, "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market." *See Fourth Protocol to the General Agreement on Trade in Services (WTO 1997)*, 36 I.L.M. 354, 367 (1997).

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COMMENTS OF
LEVEL 3 COMMUNICATIONS, INC.

I. Introduction

Level 3 Communications, Inc. ("Level 3") welcomes the opportunity to identify ways the Federal Communications Commission ("Commission") can improve the submarine cable licensing process. Level 3 believes the biennial review addressing submarine cable licensing rules affords an excellent opportunity for the Commission to become a global leader in developing rules that will set the standard for other regulators to follow. Level 3 believes that if the Commission implements the following five principles, based on those found in the WTO Agreement, the Commission will develop a pro-competitive, streamlined submarine cable regulatory framework.

- Expedite the market-entry licensing and environmental review process, including review by local authorities;
- Encourage a diversity of submarine cable builders, owners, and cable landing station backhaul providers;
- Limit application processing and rights-of-way fees by federal and local authorities to those that are cost-based;

- Deny governmental preferences to existing providers of submarine cable services; and

- Prevent existing carriers from acting anticompetitively in the submarine cable market.

II. Submarine Cable Licensing Rules Should Apply the WTO Agreement's Principles

As the Commission answers the questions it posed in its October 8, 1999 Public Notice, DA 99-2148, *International Bureau To Hold Public Forum on Submarine Cable Landing Licenses* ("Public Notice"), Level 3 recommends that the Commission look to the internationally accepted principles found in the WTO General Agreement on Trade in Services ("GATS").[2] These principles are found in both the GATS Telecommunications Annex and the Reference Paper to the Fourth Protocol[3] ("WTO Agreement"). The Annex guarantees service providers in liberalized sectors non-discriminatory access to and use of the public telecommunications network, which in most telecom markets includes backhaul facilities. The Reference Paper calls for interconnection on an unbundled, non-discriminatory, cost-oriented and transparent basis, at any technically feasible point in the network. The Reference Paper also calls for public availability of licensing criteria and application of competitive safeguards when necessary to prevent anticompetitive conduct by "major suppliers." The Annex and Reference Paper apply to submarine cable facilities and cable landing stations in countries that made market-opening commitments, unless they excluded such cable facilities.[4] These

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[2] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 2* (GATT Secretariat 1994), 33 I.L.M. 1125 (1994).

[3] *See Fourth Protocol to the General Agreement on Trade in Services* (WTO 1997), 36 I.L.M. 354 (1997).

[4] The Reference Paper is only binding on those countries that specifically agreed to adopt it as part of their market-opening commitments.

WTO-based principles are as important in the submarine cable sector as in any other subset of the telecommunications market. They are critical if regulators wish to encourage next generation submarine systems.

With the goal of promoting a more competitive market for next generation networks, and as a way of responding to the questions asked by the Commission in its Public Notice, Level 3 submits the following recommended guideline principles to applying these WTO-based principles. Application of these principles to submarine cable licensing by the Commission and regulators around the world would create a framework that would encourage providers to plan next generation submarine systems.

In order to capitalize on the rapid technology improvements in submarine fiber optics in the marketplace today, and facilitate the entry of next generation submarine systems, regulators will have to have streamlined processes in place. Level 3 urges the Commission to create a model of simplified cable licensing for regulators around the world by using these guidelines for developing streamlined competition policies that promote open submarine cable markets. Level 3 submits the guideline principles below for the Commission's consideration with the view towards their ultimate global adoption.

Adoption of these principles also will further the Commission's position that "the public interest is best served by promoting the rapid expansion of capacity in order to promote facilities-based competition that will result in innovation and lower prices to consumers of international

services."[5] Moreover, the principles are in keeping with the Commission's statement that it "continues to look for opportunities to remove regulatory obstacles to a fully competitive marketplace while retaining the appropriate ability to detect and deter anticompetitive conduct."[6]

III. Level 3's Guideline Principles

Level 3 believes that under the WTO principles the role of the government should be to facilitate operators' provision of submarine cable capacity on expeditious and reasonable terms and conditions. To accomplish this goal, governments should eliminate all unnecessary licensing requirements. Where licensing is required, governments should implement the following principles:

- Expedite the market-entry licensing and environmental review process, including review by local authorities;
- Encourage a diversity of submarine cable builders, owners, and cable landing station backhaul providers;
- Limit application processing and rights-of-way fees by federal and local authorities to those that are cost-based;
- Deny governmental preferences to existing providers of submarine cable services; and
- Prevent existing carriers from acting anticompetitively in the submarine cable market.

IV. Expediting the U.S. Licensing Process

In the Public Notice, the Commission asks how it can expedite the cable landing license process, reduce burdens on applicants and the Commission, and minimize the information the

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[5] *See In the Matter of AT&T Corp et al. Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, File No. SCL-LIC-19981117-00025, Cable Landing License, FCC 99-167, at ¶ 25 (rel. July 9, 1999) ("JUS Order").

[6] *See In the Matter of 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, IB Docket No. 98-118, Report and Order, FCC 99-51, at ¶ 17 (rel. March 23, 1999) ("1999 Streamlining Order").

Commission asks for in applications. Consistent with the first guideline, the Commission should implement the following streamlined cable landing licensing procedures. These streamlined procedures also will ensure that the Commission achieves its laudable goal of promoting the rapid expansion of capacity to fuel the growth of facilities-based competition in the provision of international telecommunications services.

Under the Cable Landing License Act of 1921 (the "Act"), 47 U.S.C. §§ 34-39, and Executive Order No. 10,530, *reprinted as amended in* 3 U.S.C. § 301 ("Executive Order"), the Commission requires carriers to obtain an individual license to land and operate each individual submarine cable system in the United States. The Act and Executive Order require the Commission to obtain approval from the United States Secretary of State prior to granting a cable landing license.[7]

The world has changed dramatically since 1921, when Congress wrote the Act. The Act speaks in terms of denying licenses if it will assist in securing rights for the landing or operation of cables in foreign countries; maintaining the rights or interests of the United States or its citizens in foreign countries; or promoting the security of the United States. The Act also allows for granting a license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed.[8] Since enactment of this statute in 1921, however, U.S. and other governments around the world have made several changes that make many of the Act's provisions either unnecessary or contrary to trade obligations. For instance, in 1934 Congress enacted the Communications Act which created the Commission and gave it power over carriers to

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[7] *See* 47 C.F.R. § 1.767(b).

[8] *See* 47 U.S.C. § 35.

ensure just and reasonable rates for use of facilities such as submarine cables. Law enforcement agencies also have been given sufficient power to monitor the operation of submarine cables to protect the security of the United States. Finally, in the period following the Commission's development of its submarine cable licensing rules, the Commission and governments around the world have developed numerous market opening measures. Such measures have been instrumental in creating phenomenal growth in international and domestic telecommunications services, which has resulted in the introduction of innovative, higher quality, and increasingly lower priced service for consumers.[9] For example, according to Pioneer Consulting ("Pioneer"), investment in transoceanic cable systems between North America and Europe grew at a rate of 20% per year from 1992 through 1998.[10] Investment is expected to grow by 24% per year from year-end 1998 to year-end 2000, so that by year-end 2000, cumulative investment in the transatlantic region will total $6.3 billion.[11] Similar growth is being experienced in the Pacific Rim region. Pioneer projects that $6 billion will be invested in submarine cable projects in the Asia-Pacific region between 1998 and 2001.[12] Pioneer identified a total of eight planned submarine cable systems for the Asia-Pacific

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[9] As the World Trade Organization recently noted, "as of July 1998, over 1,000 facilities-based international carriers were operational worldwide, compared with less than 500 just two years earlier." *See* World Trade Organization, Council for Trade in Services, Background Note by the Secretariat on Telecommunications Services, 98-4942, at ¶ 2 (rel. Dec. 8, 1998). Such competition is at least partly responsible for "sharp reductions in prices of international and national long distance services." *Id.* at ¶ 3.

[10] *See* Michael Ruddy, *Transatlantic Market to Top 46 Billion by 2001*, Communications Today (Nov. 16, 1998).

[11] *Id.*

[12] *See* Charles Mason, *Global Reliability*, America's Network (Jan. 1 1999).

region alone.[13] In addition, the enactment of market-opening trade agreements, such as the WTO Agreement, further ensures that foreign markets will be open to U.S. carriers. Under the WTO Agreement, 89 WTO Members, including all industrialized countries and 52 emerging economies, have committed to opening their telecommunications markets to competitors.[14]

With the opening of markets, and the enactment of other laws, the need for a separate cable landing license and for time-consuming and redundant licensing procedures is less justified. Ideally, companies should not be required to apply for an individual license to construct submarine cable facilities. However, elimination of the license requirement requires Congressional amendment or repeal of the Act. Until such time as eliminating the cable landing license requirement is politically feasible, several actions can and should be taken to streamline the licensing process and eliminate regulatory delay.

A. Submarine Cable Licensing Should Be Streamlined

Although the Commission cannot unilaterally eliminate the licensing requirement, it can take steps to make the licensing process expeditious and non-discriminatory. The licensing process should be streamlined so that license applications are automatically granted after a prescribed number of days of review, regardless of any outside oppositions, unless extraordinary circumstances arise. Level 3 suggests that the Commission adopt procedures for the review of cable landing license applications that are akin to the processes that the Commission has in place for Section 214

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[13] *Id.*

[14] *See* World Trade Organization, Council for Trade in Services, Background Note by the Secretariat on Telecommunications Services, 98-4942 (rel. Dec. 8, 1998).

Applications.[15] As such, in the absence of a showing that the applicant does not qualify for streamlined processing or warrants denial of the application,[16] the Commission should automatically grant the application a specified number of days after the date of public notice listing the application as accepted for filing.[17] As outlined below, the Commission should work with the Executive Branch to minimize the time needed for their review of these applications. If the Commission works out a review process with the Executive Branch similar to the Section 214 process, then twenty-one (21) days should be a sufficient period of time between the date when the application is placed on public notice and its grant date.

Even if the application does not qualify for streamlined processing, consistent with its rules for Section 214 Applications, the Commission should specify a fixed period for consideration of the application. For example, Section 63.12 of the Commission's rules states that if an application is deemed complete, but it does not qualify for streamlined treatment, the Commission must take action within ninety (90) days.[18] Likewise, if the Commission determines an application for a submarine cable landing license is complete, but does not qualify for streamlined processing, the Commission should take action within ninety (90) days.

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[15] *See* 47 C.F.R. § 63.18.

[16] *See infra* Sec. IV for a description of conditions that might warrant non-streamlined status.

[17] *See* 47 C.F.R. § 63.12.

[18] *See* 47 C.F.R. § 63.12.

B. Redundant Federal Review Should Be Eliminated

Prospective licensees are subject to redundant review at the federal level. Multiple levels of review at the Commission and other Executive Branch agencies create delays and uncertainties in the licensing process. For example, when a cable license application is filed at the Commission, a copy is sent to the United States Department of State ("State Department") for approval. The State Department then coordinates its approval with several other Executive Branch agencies, including the National Telecommunications and Information Administration of the United States Department of Commerce and the Department of Defense.

This extensive Executive Branch review is unique. No other type of telecommunications facility licensed by the Commission requires such involved Executive Branch review. But there is nothing special about submarine cables that should require such increased scrutiny by the Executive Branch. The only difference is that the Executive Order requires the Commission to get Executive Branch approval, and that the Commission's administration is the result of State Department delegation in recognition of the Commission's special expertise. Level 3 believes the Commission can comply with this approval requirement while taking steps to make it more of a formality then a drawn out process.

The Commission's process of waiting for a letter from the Executive Branch approving each cable landing license application results in needless delays. For example, although the State Department often takes months to respond to the Commission's notices with regard to applications, Level 3 is not aware of any instance in which the State Department's response raised concerns with regard to a cable landing license application since implementation of the U.S. WTO commitments.

Therefore, the administrative coordination period would appear to be unnecessarily protracted[19]

In addition, although Commission review is open and subject to *ex parte* procedures, Executive Branch review is a closed process. Under the current regime, no public guidelines exist as to which agencies will review the license application, or what criteria will be used. The absence of guidelines results in a confusing and time consuming submarine cable license approval process, which is not consistent with the Commission's stated goal of promoting the rapid expansion of capacity in order to promote facilities-based competition that will result in innovation and lower prices to consumers of international services.

Although the Commission is not in a position to impose *ex parte*-type requirements on other government agencies, there are steps the Commission can take to minimize the confusion, while ensuring that deserving applicants obtain licenses in an expeditious manner. In lieu of an amendment to Executive Order No. 10,530, the Commission should establish a streamlined two-week procedure for obtaining Executive Branch approval of submarine cable license applications.

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[19] The last time that the State Department raised concerns regarding an application for a submarine cable landing license was in 1993. *See In the Matter of AT&T et al.*, File No. SCL-93-001, Cable Landing License, FCC Rcd 5038, at ¶ 8 (1993) ("Columbus II Cable Landing License"). The State Department requested that ownership interests of Telefonica Larga Distancia de Puerto Rico ("TLD") in the portion of the Columbus II cable system designated for service to Spain be deferred pending further review. *Id.* TLD is a subsidiary of Telefonica de Espana, S.A., the dominant provider of domestic and international telecommunications services in Spain. The Commission subsequently denied TLD's cable landing license due to the absence of effective competitive opportunities to have ownership interests in cable facilities in Spain. *See Telefonica Larga Distancia de Puerto Rico, Inc.*, File Nos. ITC-92-116-AL, SCL-93-001, ITC-93-029, Memorandum Opinion and Order, 12 FCC Rcd 5173 (1997). Following implementation of the WTO Agreement, TLD successfully applied for a modification of the Columbus II submarine cable landing license to add TLD as a licensee of Columbus II for the provision of service between the United States and Spain. *See Telefonica Larga Distancia de Puerto Rico, Inc.*, File No. SCL-93-001, Modification of Cable Landing License, 13 FCC Rcd 9548 (1998). The Commission cited Spain's membership in the WTO as a determining factor in grant of the license. *See id.* at ¶ 9. The State Department did not oppose TLD's most recent application. *See id.* at ¶ 8.

One agency, preferably the State Department, should remain the lead agency for non-Commission review, and fixed timelines for review by other interested, previously-identified agencies should be established within the general review period. As mentioned above, such a streamlined procedure could be modeled on the Commission's Section 214 international telecommunications service licensing procedures, whereby automatic approval of the Executive Branch would be assumed in 14 days, unless serious prior objections are raised and supported on the record. A 14-day deadline would provide Executive Branch agencies with sufficient time to raise concerns with regard to an application, while also ensuring that the Commission is able to grant most applications in a streamlined manner.[20] This procedure also minimizes unnecessary delay caused by meritless petitions. As in the Section 214 processing, the Commission should automatically grant a streamlined application, even if oppositions are filed, unless the Commission staff independently determines from the record that the application raises extraordinary issues. As in the Section 214 process, the Commission would have discretion to remove from streamlined processing any application the Commission found to trigger a special need for public comments.

C. Only Landing Parties[21] Should Be Required to Obtain a License

In the Public Notice, the Commission asks what sort of ownership requires an entity to be a licensee on a cable landing license. Level 3 believes that in large consortium cables, it no longer makes sense to require all carriers with ownership interests to be co-applicants. Non-landing parties

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[20] Such expedited procedures can also promote U.S. trade policy goals, as it demonstrates the U.S. Government's commitment to licensing streamlining and transparency as a result of the WTO Agreement.

[21] "Landing parties" are those which possess actual control over cable landing stations.

generally tend to be small U.S. and WTO member country[22] carriers with little market power and a non-controlling interest in the consortium.[23] As the Commission acknowledged, such non-landing carriers are rarely in a position to deter the construction of additional capacity -- a central focus of the Commission's cable landing license public interest analysis.[24] Landing parties, on the other hand, which may control bottleneck facilities, such as cable landing stations, potentially possess the power and incentive to act anti-competitively by charging monopoly rents and ultimately discouraging additional capacity from being constructed.[25] Therefore, in order to ensure that licenses are processed in an expeditious manner while also ensuring that the public interest is protected, the Commission should limit the licensing requirements to U.S. landing parties only. As a corollary to this limitation, the Commission should also eliminate the requirement for prior approval to add new, non-landing parties.

D. Standard Conditions Should Be Publicly Available

The Commission asks in its Public Notice whether the conditions routinely imposed on licenses remain necessary. Level 3 believes that there are ways the Commission can improve its

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[22] The Commission has noted that "carriers from WTO member countries would rarely be able to harm competition in the U.S. market by acting anticompetitively." *See JUS Order* at ¶ 20.

[23] The recent application for the Japan-U.S. Cable Network included thirty-two (32) parties; however only five (5) of the applicants, AT&T Corp., Japan Telecom, KDD Corporation, MCI WorldCom and NTT are to operate landing stations, and only AT&T and MCI WorldCom are to operate them in the United States. *See* AT&T Corp. *et al.*, Joint Application for a License to Land and Operate a Submarine Network Between the United States and Japan, File No. SCL-LIC-19981117-00025, filed Nov. 17, 1998. Not surprisingly, these landing parties possess the largest voting interests in the consortium.

[24] *See JUS Order* at ¶ 25.

[25] *Id.* at ¶ 32.

process for conditioning licenses. First, standard potential conditions on the operation of submarine cables should be publicly available. The Commission could place the conditions in a rule much as it does now for Section 214 authorizations.[26] For example, clear standards should be established as to when a submarine cable will be subject to more stringent regulation because of an owner's market power. These standards, which are described in greater detail in Section VI below, should focus on the historical benefits of incumbency relating to the particular owner, on the relevant market share of capacity on the route being served by the owner, and on the legal ability of other carriers to build competing cable systems on the route.[27]

If license conditions are clarified and made publicly available, the Commission could also eliminate the requirement that licensees notify the Commission within thirty (30) days of the grant of the cable license of the licensee's acceptance of the conditions of the license. If prospective licensees are aware of such conditions prior to applying for licenses, such acceptance would be inherent in the license. As such, it would be unnecessary for the Commission to impose such a requirement on licensees. The clarification and publication of such standards would be consistent with the Commission's stated goal of ensuring increased access to submarine cable capacity.

V. Encouraging Diversity of Submarine Cable Builders, Owners, and Backhaul Providers

The Commission has long recognized the importance of diversity in the submarine cable industry.[28] Such diversity is critical to ensuring that competitively priced and high quality service

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[26] *See* 47 C.F.R. §§ 63.21-23.

[27] Where, for example, a landing party at the destination end of the system holds monopoly or semi-monopoly landing rights, competing cables may be delayed, impeded, or even foreclosed.

[28] *See, e.g., American Telephone & Telegraph Co., et al.*, File No. ITC-91-136, FCC

is provided to consumers. As the WTO has noted, increased accessibility and variety of telecommunications services and providers is the foundation of successful national and global information society initiatives and the benefits these initiatives will bestow.[29] Therefore increasing diversity in the submarine cable industry should be a key guideline to implementing the WTO principles.

The Commission should take the following additional steps to increase the diversity of submarine cable builders, owners, and backhaul providers: (i) licensing and other fees should be non-recurring, reasonable, and related to administrative costs; (ii) carriers should be permitted to convert to end-to-end ownership when destination markets become competitive; and (iii) companies should continue to be permitted to build private cable systems without common carrier obligations. Such steps will ensure the U.S. submarine cable landing market is open to all companies that want to participate.

A. Fees Should Be Non-Recurring, Reasonable and Related to Administrative Costs

Licensing, regulatory, and other types of fees such as right-of-way fees, should be non-recurring, reasonable and related to recovering the actual administrative cost of licensing. Petitioner is aware that the Commission addressed the issue of licensing fees in its most recent Biennial

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91-419, 7 FCC Rcd. 136, at ¶ 14 (rel. Jan. 10, 1992) ("We have previously found that increasing media and route diversity to strengthen service reliability is of decisional significance to our public interest determination to authorize the construction of transoceanic facilities"); *see also American Telephone & Telegraph Co., et al.*, File No. ITC-93-029, DA 93-910, 8 FCC Rcd. 5263, at ¶ 13 (rel. Jul. 28, 1993); *American Telephone & Telegraph Co., et al.*, File No. ITC-93-030, DA 93-911, 8 FCC Rcd. 5287, at ¶ 5 (rel. Jul. 28, 1993).

[29] *See* World Trade Organization, Council for Trade in Services, Background Note by the Secretariat on Telecommunications Services, 98-4942, at ¶ 6 (rel. Dec. 8, 1998).

Review of International Common Carrier Regulations.[30] In the *1999 Streamlining Order*, the Commission reviewed the licensing fees for non-common carrier and common carrier cable landing licenses, but did not address the more general issue of the reasonableness of all the fees, including recurring regulatory fees, assessed on cable landing licensees. In the *1999 Streamlining Order*, the Commission noted that submarine cable landing license fees are $12,975 per license.[31] This does not include the numerous other nonrecurring and recurring fees that are assessed by state and local regulators on submarine cable landing licensees. Such fees, which often bear no relationship to the administrative or other costs of licensing and are often imposed upon prospective licensees in a discriminatory manner, constitute a barrier to entry.[32]

Although Section 8 of the Communications Act, 47 U.S.C. § 158, details fees applicable to cable landing licenses, its also permits the Commission to waive or defer payment of an application fee in any specific instance for good cause shown, where such action would promote the public interest. The fees included in Section 8 are supposed to reflect the Commission's cost of processing applications. However, the process of reviewing submarine cable license applications has been streamlined with no corresponding reduction in fees. The additional streamlining that the Commission is contemplating will reduce costs further. In light of the reduced costs to process applications, the Commission would be justified in waiving or forebearing from applying the

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30 *See 1999 Streamlining Order* at ¶ 66.

31 *Id.*

32 Indeed, the fee charged non-common carrier systems is the same as the total charged for common carrier systems whose license fees are the sum of separate cable landing license and Section 214 application fees. Clearly, the fee for a non-common carrier cable cannot be based on the processing cost if there is no Section 214 application being processed (although there may be an intent to treat all cables equally).

licensing fees assessed on submarine cable license applicants.[33]

Finally, the Commission should modify the regulatory fee structure as it applies to international bearer circuits on submarine cables. The Commission charges carriers, on an annual basis, $7.00 per 64 KB active circuit on a submarine cable. This fee is excessive and puts a disproportionate burden on the owners of submarine cables to pay for the regulatory activities of the International Bureau. This fee does not capture contributions from any of the hundreds of international resellers that benefit from the international activities of the Commission. Further, in today's world of high capacity submarine cables, carrying both voice, data, broadband and IP-based services, it does not make sense to charge regulatory fees that are based on a 64 KB circuit model. This model can result in a disproportionate amount of fees being assessed on owners of large amounts of bandwidth, such as private cable system owners, regardless of the types of services they provide. Ultimately these excessive fees discourage the building of private cables. They also serve as bad precedent to foreign regulators that might be looking for ways to increase government revenues.

B. Carriers Should Be Permitted to Convert to End-to-End Ownership When Destination Markets Become Competitive

In order to ensure that carriers reap the benefits of market opening events in destination countries, the Commission should impose conditions on licenses for submarine cables systems that land in countries with closed markets. The Commission should require submarine cable licensees to permit companies leasing capacity on cables landing in countries with closed or substantially closed markets to convert those leases to ownership interests when closed markets open up.

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[33] This, too, may provide an important model for regulators in other countries.

Moreover, if carriers become able through market liberalization to operate both ends of a cable, they should be able to convert correspondent bandwidth and backhaul arrangements to end-to-end ownership (for example, Indefeasible Rights of Use ("IRUs")) at a reasonable cost without undue penalties. In the case of a lease, the Commission should clarify that the correspondent carrier should not be permitted to refuse to convert from a lease to an ownership arrangement after the lease has run out or it has been given a reasonable cancellation fee.

C. Companies Should Be Allowed to Build Private Cable Systems Without Common Carrier Obligations

The Commission rightly focuses its Public Notice on the question of whether the Commission should maintain the distinction between common carrier and non-common carrier cable landing licenses. This is an important question because leadership by the Commission in this area can lead to important results in other countries. Many foreign regulators look to the U.S. licensing process for guidance as to how to regulate the submarine cable industry. The Commission's licensing regime can be confusing because some carriers are required to be licensed as telecommunications services providers, *i.e.*, get Section 214 authority to get a cable landing license, whereas other carriers are not subject to the same requirements. Level 3 notes that the Cable Landing License Act, 47 U.S.C. §§ 34-39, makes no distinctions between common carrier and non-common carrier licenses. In addition, the legal distinction between common carrier and non-common carrier submarine cable systems is vague. Many submarine cable systems today are a hybrid of the old consortium model and the private systems model and therefore do not easily fit into the common carrier or non-common carrier category. The distinction is an artifact of the former facilities planning process that was in place when the first private systems were licensed, and

systems' costs formed part of a carrier's rate base. In spite of the vagueness of the distinction, and that both private and consortium systems utilize non-carrier external financing, the Commission continues to categorize submarine cable systems in this manner. The result is uncertainty in the marketplace as to what regulations will apply to a given proposed submarine cable system. This uncertainty is compounded by the fact that problems arising from the ownership and operation of a submarine cable system cannot be addressed by applying current common carrier regulation.

One solution to this problem is to eliminate the common carrier and non-common carrier distinction and instead create meaningful, relevant categories of licensing conditions that can be applied based on ownership structure and the market conditions at each end of a cable. Instead of having common carrier and non-common carrier cables, with all of the regulatory baggage that comes with those terms, there could be categories such as streamlined systems and market-structure conditioned systems. For instance, if there are market access restrictions on one end of a cable that limit the number of entities that can land and successfully operate cables, and one of the owners of the cable is a major supplier[34] of telecommunications services on that route, the Commission could make it a conditioned cable system subject to market structure conditions that ensure that cable capacity is available on reasonable terms to all U.S. carriers. The Commission could publish a list of such markets and major suppliers. Some possible conditions are listed in Section IV below. Knowing what conditions will be placed on the license based on the ownership structure and whether

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[34] A "major supplier," as used in Level 3's comments, is a major supplier of telecommunications services as defined in the WTO Reference Paper, *i.e.*, "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market." *See Fourth Protocol to the General Agreement on Trade in Services*, 36 I.L.M. at 367.

the cable went to an open or closed market would give carriers some certainty at the time they plan a cable.

Removing the common carrier/non-common carrier label from cable systems also would allow for a more rational way to regulate the carriers participating in the construction of the system. The Commission could focus on the circumstances of individual owners, and what services they offer and how they hold themselves out to the public, to determine whether they should be regulated as common carriers or not. This would allow both common and non-common carriers to participate in submarine cable systems together, without, for example, entities providing enhanced services being required to get Section 214 authority in order to buy capacity on a common carrier submarine cable system.

VI. The Commission Should Continue Preventing Carriers from Acting Anticompetitively in the Submarine Cable Market

Consistent with the changes described above, the Commission should develop special conditions for the licenses of submarine cables where participants include carriers that are major suppliers, whether or not those carriers are U.S.-licensed carriers. This is necessary to prevent such carriers from acting anticompetitively in the submarine cable market. Moreover, it directly addresses any competitive problems raised by certain ownership structures. For example, when major suppliers participate in the building or administration of a cable system, the Commission should impose additional conditions to ensure that such carriers cannot act anticompetitively in the submarine cable market on that route.

Submarine cables that include ownership by major suppliers should have conditions in their licenses that require the cable systems to be open to competing carrier co-owners. In particular,

competing carriers should have complete access to cable stations[35] and backhaul. Major suppliers should be required to implement certain policies and procedures which ensure that all other carriers have fair and nondiscriminatory access to submarine cable facilities. The following conditions, placed on a cable landing license involving a major supplier, can be used to facilitate such access.

A. Cable Station Access

Competing carriers should be allowed to physically collocate at the cable station[36] of a major supplier and use their own multiplexing equipment. If it is necessary to use equipment, such as DACS equipment, owned by the incumbent major supplier carrier at its cable station, access should be given on a reasonable, timely, and non-discriminatory basis (at the same prices the cable station owner charges itself). Alternatively, new carriers should be able to access the cable head on nondiscriminatory and reasonable terms and conditions. To ensure this, circuit provisioning and interconnection intervals should be established. Carriers should be able to use their own multiplexing equipment and should not be forced to pay to use the cable station owners' equipment in order to interconnect their backhaul at the cable head. If such interconnection imposes additional costs on the operator, the party obtaining the special access should reimburse only those direct costs. In addition, the cable station owner that is a major supplier must provide transparency into the cost allocation at the cable station, showing clearly how its domestic and international cable facilities, including backhaul, are separated and separately priced.

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[35] On "streamlined" cable systems where all of the capacity is sold on a city-to-city basis, however, access does not need to be made available at the cable station, but instead only at the point where carriers acquiring capacity first have access to that capacity, e.g., a telehouse.

[36] *Id.*

B. Backhaul

A competing carrier should be able to negotiate a backhaul contract with a major supplier on a timely and reasonable basis, with non-discriminatory pricing, equivalent to what the provider of backhaul charges itself or an affiliate. Times for activation of backhaul capacity should be reasonable and accomplished using the same timing and terms and conditions that apply to the major supplier that is self-provisioning its backhaul. Major suppliers should not be able to have exclusive right-of-ways, but should be required to share these right-of-ways. Moreover, all capacity, including terrestrial backhaul facilities, should be made available in units that reasonably accommodate new entrants' needs. On streamlined cable systems where all of the capacity is sold on a city-to-city basis, these backhaul conditions would not be relevant.

C. Additional Procedural Requirements

Major suppliers should also be subject to certain procedural requirements, which will ensure that competitors have access to bottleneck facilities. Major suppliers should be required to consistently honor requests to expedite orders for service, and the standard lead times should be reasonable. A major supplier's expedite charges also should be reasonable, and include a guarantee that the deadline will be met. In addition, information about pricing and availability for IRUs, terrestrial backhaul, and cable maintenance and restoration should be freely available to prospective purchasers. In this vein, any volume/term discounts offered by a major supplier should be reasonable and cost-justified. In consortium cables, submarine cable and related operations should be separate from terrestrial telecommunications services operations in order to prevent the traditional cable administrator from folding domestic network costs into costs for terrestrial backhaul and cable station facilities, which are then paid by all cable consortium members.

Procedures for processing cable capacity and services requests should be streamlined and expedited so that competing service providers can implement capacity as quickly as the existing cable administrator activates its own capacity. There should be automatic and equitable access to restoration: restoration should be provided on an "as activated" basis rather than an "as purchased basis." There should be no restrictions in the Construction and Maintenance Agreement or elsewhere that would keep participants in a cable system from acquiring capacity in other competing cable systems. Finally, if a cable system can be technically upgraded, but the major suppliers participating on the system refuse to allow the upgrade, then those carriers should be required to sell any of their unused capacity to the new entrants.

VII. Other Issues

The Commission has requested comments on any other issues it should address related to submarine cables. In addition to the issues discussed above, Level 3 requests that the Commission explore expediting the licensing process and placing limitations on licensing fees at the state level. U.S. submarine cable licensees often must obtain both state and federal approval for cable landing licenses, even though the areas of review often coincide. In addition, licensees are often subject to unreasonable and discriminatory state and local submarine cable licensing fees. Such redundant review and discriminatory treatment imposes unnecessary and cumbersome regulatory requirements on submarine cable operators and conflicts with the Commission's implementation of the Cable Landing License Act, as well as Section 253 of the Telecommunications Act, 47 U.S.C. § 253.

In order to alleviate this burden, the Commission should expedite the licensing process and explore placing limitations on the licensing fees imposed by state and local regulators on submarine cable operators. If necessary, the Commission should take preemptive action. Just as the

Commission justifiably has preempted states in other areas, Level 3 proposes that the Commission consider the following three options: (i) federal preemption of all state licensing of international and interstate submarine cables; (ii) prohibition of state license fees that are not related to the actual administrative costs of licensing; and (iii) limited preemption (including time limits) of state review in certain areas such as: (a) environmental impact; (b) historic preservation; and (c) rights-of-way.

As summarized by the Supreme Court in *Louisiana Public Service Commn v. FCC*, 476 U.S. 355, 368-69 (1986), the Supremacy Clause of Article VI of the United States Constitution provides Congress with the power to pre-empt state law. Preemption occurs: (1) when Congress, in enacting a federal statute, expresses a clear intent to preempt state law;[37] (2) when there is outright or actual conflict between federal and state law;[38] (3) where compliance with both federal and state law is in effect physically impossible;[39] (4) where there is implicit in federal law a barrier to state regulation;[40] (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the State to supplement federal law;[41] or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[42] Preemption may result not only from action taken by Congress itself, but also from a federal agency, such as the

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37 *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

38 *See Free v. Bland*, 369 U.S. 519 (1977).

39 *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

40 *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

41 *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

42 *See Hines v. Davidowitz*, 312 U.S. 52 (1941).

Commission, acting within the scope of its congressionally delegated authority.[43]

In the instant case, state oversight of cable landing license applications clearly stands as an obstacle to the accomplishment and execution of the full objectives of Congress in the Cable Landing License Act and the Communications Act of 1934, as amended. In accordance with the Cable Landing License Act, Executive Order No. 10,530 states that "[t]he Federal Communications Commission is hereby designated and empowered to exercise . . . all authority vested in the President by the [Cable Landing License Act] . . ., including the authority to issue, withhold, or revoke licenses to land or operate submarine cables in the United States." Consistent with this delegation of power, the Commission has promulgated rules relating to the processing of submarine cable landing license applications. As discussed above, the Commission has found that the public interest is best served by promoting the rapid expansion of capacity.[44] Moreover, "[t]he Commission continues to look for opportunities to remove regulatory obstacles to a fully competitive marketplace while retaining the appropriate ability to detect and deter anticompetitive conduct."[45] In addition, Section 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253, states that state and local regulations must be competitively neutral and may not have the effect of preventing any entity from providing intrastate or interstate telecommunications services.

Cumbersome, time-consuming, redundant, and discriminatory review of submarine cable landing proposals by state and local authorities, in addition to leading to exorbitant fees, conflicts

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[43] *See Fidelity Federal Savings and Loan Ass'n. v. De la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

[44] *See JUS Order*, at ¶ 25.

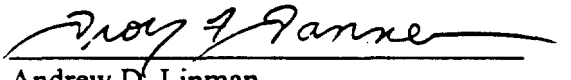
[45] *1999 Streamlining Order* at ¶ 7.

with these principles. As such, the Commission should preempt state and local oversight over the submarine cable landing license process where necessary to achieve the general principles outlined above.

VIII. Conclusion

WHEREFORE, Level 3 Communications, Inc. requests that the Commission amend its rules relating to the licensing of submarine cable systems so as to implement the pro-competitive guideline principles identified in these comments. The implementation of these principles will promote achievement of the goals of the WTO Agreement, and make the Commission a global leader in implementing the WTO Agreement. These measures also will help the Commission achieve its goal of encouraging facilities-based competition in the international submarine cable industry, which will result in increased innovation and lower prices for consumers.

Respectfully submitted,



Patricia Paoletta
William P. Hunt, III
Level 3 Communications, Inc.
1025 Eldorado Blvd.
Broomfield, CO 80021
(720) 888-1000

Andrew D. Lipman
Troy F. Tanner
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for
Level 3 Communications, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2000, copies of the Comments of Level 3 Communications, Inc. were served via hand delivery on the following parties:

Donald Abelson
Chief, International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

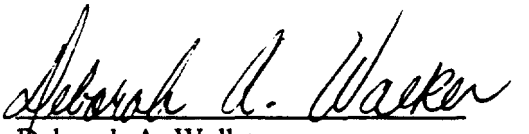
Rebecca Arbogast
Chief, Telecommunications Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Breck Blalock
Chief, Policy and Facilities Branch
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Anna Gomez
Deputy Chief, International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

George Li
Deputy Chief, Telecommunications Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Elizabeth Nightingale
Attorney-Advisor
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554



Deborah A. Walker